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BOOK REVIEWS

POWER OF FEDERAL JUDICIARY OVER LEGISLATION. By J. Hampden Dougherty.
New York: G. P. Putnam's Sons, 1912.

A discussion very nearly as old as the Republic itself, a controversy that has been waged with acrimony and great show of bitterness at times, a difference that has called forth some of the most astute legal reasoning of the past century, is still as far from adjustment as at the time of its inception. The old arguments *pro* and *con* on the question of whether or not our judiciary has the power to set aside acts of the legislative branch of the government as unconstitutional, have taken the modern form of agitation over judicial recall and recall of judicial decisions, but the latter is merely an outgrowth, or offspring, so to speak, of the former. The foundations of the two are the same; their basic essentials are identical. And the questions raised are not confined to the philosophical fulminations of legal theorists. We meet them in the learned publications of political science societies, we listen to them as expounded by the practical politician from the stump, we participate in them over the family dinner table. Therefore, Mr. Dougherty's new book ought to find a hearty welcome in numerous and diverse circles. It is not so technical or so specialized that the ordinary layman cannot read it without an immediate comprehensive grasp of its thesis. Nor yet is it so elementary that the precise and exacting student of this phase of our legal development will not find much in it of interest and value.

The title of Mr. Dougherty's essay is rather vague and perhaps misleading, for it is undoubtedly too wide for the scope of the work. The subject treated is the origin of the power of the judiciary to declare legislation unconstitutional and the historical justification for the exercise of such a power. Mr. Dougherty's argument is that the Constitutional Convention of 1787 expressly intended to confer this power upon the Supreme Court and the federal judiciary. He points out that such power was not unknown to the laws of foreign nations, is to be found in the Roman and canon laws, and had several times been used in England prior to the English Revolution of 1688. Then coming to America, he shows that there were a few instances of judicial annulment of legislation in the colonies, and a number of highly important and widely discussed cases in the states just before the calling of the Convention. All this being in the minds of the framers of the Constitution, liberal extracts from the records of the Convention's debates show how the framers thought they were conferring just this power upon the judiciary when they put in the form we now have them the "Supreme Law" clause of the Constitution (Art. VI) and the cognate clause which established the Federal judiciary upon a firm basis (Art. III, Sect. 2). Arguments and debates in the ratifying conventions of the several states strengthen this position.

Mr. Dougherty briefly sketches the history and career of his theory through the nineteenth century down to the present time. He then takes up the origin of the opposite view in the Virginia and Kentucky Resolutions of 1798-99, that since the Constitution does not in so many words confer power on the judiciary to set aside unconstitutional legislation, that power does not exist. This doctrine, too, is traced right down to to-day and then its fallacy pointed out. In closing, the author devotes a few pages to what he believes are remedies preferable to any system of judicial recall.

This book, written in a most excellent, interesting style, is easy reading. And, a feature that will commend itself to many, it is not too large to slip into one's pocket.

J. F. N.